Supreme Court, U.S.
FILED
FEB 29 1996
CLERK

(2)

No.95-1205

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF IDAHO,

Petitioner,

v.

BRYAN STUART LANKFORD,

Respondent.

Petition for Writ of Certiorari To The Supreme Court of the State of Idaho

---

MOTION TO PROCEED IN FORMA PAUPERIS AND SUPPORTING AFFIDAVIT

Respondent, Bryan Stuart Lankford, requests leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Idaho without prepayment of costs and to proceed in forma pauperis, under Rule 39 of the United States Supreme Court Rules, and 28 U.S.C. section 1915(a).

Petitioner's affidavit in support of this motion is attached hereto. Leave to proceed in forma pauperis was sought and obtained in the Supreme Court of Idaho and previously in this Court.

DATED this 29th day of February, 1996.

HIPP

Joan Marie Fisher
Counsel for Respondent
P.O.Box 145
Genesee, ID 83832
(208) 285-1101

CERTIFICATE OF VERIFICATION
IN SUPPORT OF THE PETITIONERS AFFIDAVIT/DECLARATION

I Bryan Stuart Lankford, do hereby swear and declare under the law's and penalty's of perjury, that the information contained herein the accompanying affidavit or declaration in sopport of petitioners motion for leave to proceed in Forma Pauperis is true and correct to the best of my knowledge, and in doing so, declare and swear the same before a Notary Public for the State of Idaho.

Dated this day, the 15th **of Feburary, 1996.**

Bryan Stuart Lankford
Idaho Correctional Institution/Orofino
Hospital North Drive #23
Orofino, Idaho 83544

SUBSCRIBED AND SWORN TO BEFORE ME, ON THIS DAY, THE 15 **OF FEBURARY, 1996.**

Gary T Virgin
Notary for the state of Idaho:

GARY T. VIRGIN
NOTARY
PUBLIC
STATE OF IDAHO

8/7/2001
My commission Expires on:

Orofino
I Reside at:

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Bryan Stuart Lankford ,am the petitioner in the above entitiled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes_____ No XXX

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you recieved.

1983. Monthly salary; twenty five hundred.

2. Have you recieved within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes___ NoXXX

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

N/A

3. Do you own any cash or have a checking or savings account? Yes___ NoXXX

a. If the answer is yes, state the total value of the items owned.

N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property. (excluding ordinary household furnishings and clothing) Yes___ NoXXX

a. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. N/A

I declare under penalty of perjury that the foregoning is true and correct.

Executed on; 15 FEBURHRY, 1996 .

Bryan Lankford
(Signature)

No. 95-1205

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October Term 1995

STATE OF IDAHO,

Petitioner,

v.

BRYAN STUART LANKFORD,

Respondent.

Petition for Writ of Certiorari To The Supreme Court of the State of Idaho

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the holding of the Supreme Court of Idaho after remand was inconsistent with this Court's opinion in *Lankford v. Idaho*, 500 U.S. 100 (1991)?

2. Whether *Santobello v. New York* requires that a prosecuting attorney's recommendation for a life sentenc be enforced on resentencing after remand by this Court, even though circumstances have changed?

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REFERENCES

Due to the numerous proceedings of Respondent's case the following is submitted as an aid to the Court.

A. Transcripts

1. "Tr Trial" refers to the reporter's transcript of the trial itself. It is in five volumes, I-V

2. "R Trial" refers to the clerk's record of trial itself. It is in two volumes, I, II.

3. "TR Sent" refers to the reporter's transcript of the Original Sentencing. It is in one volume.

4. "TR RS" refers to the reporter's transcript of the re-sentencing. It is in twelve volumes, 1-12.

5. "R RS" refers to the clerk's record of resentencing. It is in two volumes, I, II.

6. "TR RS Exhibit, Motions Appendix" refers to a volume of Exhibits filed in support of the Pre-Sentencing

   Motions.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitution, Fifth Amendment:

> No person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty , or property without due process of law . . . .

U.S. Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . and to have the assistance of counsel for his defense.

U.S. Constitution, Fourteenth Amendment:

> §1. . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

The Respondent and his brother, Mark Henry Lankford, were bound over to District Court on two counts of Felony Murder in the deaths of Robert and Cheryl Bravence. R Trial, Vol I, pp. 112-120, 128.

> After the arraignment, petitioner's appointed counsel entered into plea negotiations with the prosecutor. During these negotiations, petitioner agreed to take two lie-detector tests. Although the results of the tests were not entirely satisfactory, they convinced the prosecutor that petitioner's older brother Mark was primarily responsible for the crimes and was the actual killer of both victims. [Citation omitted.] The parties agreed on an indeterminate sentence with a 10-year minimum in exchange for a guilty plea, subject to a commitment from the trial judge that he would impose that sentence. In February 1984, the judge refused to make that commitment. [1] In March, the case went to trial. The State proved that [Respondent] and his brother decided to steal their victims' Volkswagen van. [Respondent] walked into the Bravences' campsite armed with a shotgun and engaged them in conversation. When Cheryl left and went to a nearby creek, Mark entered the campsite, ordered Robert to kneel down, and struck him on the head with a nightstick. When Cheryl returned, Mark gave her the same order, and killed her in the same manner. See *State v. Lankford*, 113 Idaho 688, 691, 747 P.2d 710, 713 (1987).

Lankford v. Idaho, 500 U. S. 110, 112 (1991). The jury returned a verdict of guilty on two counts of First Degree Felony Murder on March 31, 1984. R Trial, Vol. II, pp. 243, 249, 296.

Following conviction and before sentencing, Respondent entered into an agreement with the State in which, in exchange

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[1] Petitioner incorrectly states that Lankford did not accept a prior offer of a recommendation of indeterminate life made by the prosecutor in exchange for a guilty plea. Petition, at 7 n.2. The offer was made and accepted conditioned upon the judge's acceptance of the recommendation. The trial judge, not Respondent, nixed the initial plea agreement. *Lankford v. Idaho*, 500 U.S., at 112.

for Respondent's cooperation in the prosecution against Mark Lankford, the State agreed to: 1.) grant Respondent immunity "co-extensive with I.C. §19-1114" which was expressly approved by the trial judge; 2.) to recommend an indeterminate life sentence in exchange for Respondent's cooperation (R RS vol I, pp. 364, 390); and to keep Respondent separate from the co-defendant, Mark Henry Lankford (R vol. II, p. 6).

Pursuant to the parties' agreement, Respondent testified for the State of Idaho against Mark Lankford. R RS Respondent's Exh. Motions Appendix D (filed in Support of Pre-Sentencing Motions). The testimony was the only direct testimony of the manner in which the offense was committed. The testimony supported the State's theory that Mark Lankford instigated a robbery, assaulted the victims during the robbery and committed the killings. Bryan's testimony further provided details as to the Lankfords' activities following the robbery up to and including their arrest. In all, Respondent's testimony at Mark Lankford's trial comprised over 200 pages of transcript. Respondent's Exh. Motions Appendix D. Based on Respondent's testimony, Mark Lankford was convicted of two counts of first degree murder and sentenced to death. *See State v. (Mark) Lankford*, 116 Idaho 860, 874-75, 781 P.2d 197 (1989), *cert. denied*, 497 U.S. 1031, 110 S. Ct. 3295.

Pursuant to an order by the trial judge and agreement of the parties, the State filed a Notice of its Intent Not to Seek the Death Penalty at the original sentencing. R Trial, vol II, p.

331. Following a pre-sentencing investigation (R Trial, Vol. II, pp. 328-29, Exh. PSI), psychological evaluation (R Trial, Vol.II, pp. 328-329), a change in counsel (R Trial vol. II, pp. 351, 395) and various pre-sentencing motions (Tr Sent. p. 14, *et seq*), a sentencing hearing was held and despite the State's notice to the contrary, and without further Notice from the trial court, the judge sentenced Respondent to death on October 12, 1984. R Trial, Vol. II, pp.413-415.

Following post-conviction proceedings pursuant to Idaho Code §§19-4901, a consolidated appeal was taken pursuant to Idaho Code §19-2719, and the judgment and sentence affirmed. *State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987). Certiorari was granted and the Judgement and Sentence vacated and remanded by the United States Supreme Court, 486 U.S. 1051, 108 S.Ct. 2815, 100 L.Ed.2d 917 (1988) for reconsideration in light of *Satterwhite v. Texas*. After vacating its prior order, 114 Idaho 817, 761 P.2d 1169, the Idaho Supreme Court reaffirmed its prior decision. *State v. Lankford*, 116 Idaho 279, 775 P.2d 593 (1989). On certiorari a second time, the United States Supreme Court, Justice Stevens, held that due process was violated at the sentencing where, at the time of the sentencing hearing, the Respondent and his counsel did not have adequate notice that the trial judge was considering imposition of a death sentence following the court-ordered notice by the State that it was not seeking the death penalty. *Lankford v. Idaho*, 500 U.S. 110, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991).

On remand from the Idaho Supreme Court, the Attorney General's Office was appointed special prosecutor upon Motion of the Idaho County Prosecuting Attorney. R RS vol. I, pp. 14, 18. The original trial judge disqualified himself at Respondent's request (R RS vol. I, pp. 12, 33-38) and the matter was assigned to the Honorable Ronald D. Schilling of the Second Judicial District (R RS vol. I, p. 145).

On January 27, 1992, pursuant to Court Order, the Attorney General's Office filed its "Notice of the Intention to Seek the Death Penalty." R RS vol. I, pp. 183-185. Pursuant to and upon review of the State's Notice, the trial court filed its Notice of the Court's Intent to Consider the Imposition of the Death Penalty. R RS vol I, p. 187.

Respondent filed, among other motions, a Motion to Strike State's Notice and Specifically Enforce Sentencing Agreement (R RS vol. I, pp. 189) and Motion to Exclude Evidence and Argument in Aggravation of Sentence (R RS vol I, p.231). Following briefing and argument, the trial court issued its Decision and Order Regarding Remaining Pre-Sentencing Motions, granting in part and denying in part, Respondent's Motion to Strike State's Notice and Specifically Enforce Sentencing Agreement and, striking the State's Notice of Intent to Seek the Death Penalty and Ordering the State "not to recommend a sentence upon re-sentencing inconsistent with the sentence recommended by the original prosecutor at the Respondent's first sentencing." R RS vol. II, p. 33. See Excerpt from Decision and Order, dated April

2, 1993, attached hereto and marked Appendix A.

> Judge Schilling reviewed the record and the findings of Judge Reinhardt and held that the state had promised to recommend an indeterminate life sentence in exchange for Lankford's testimony and cooperation. The [trial] court held that this promise was enforceable because the defendant's cooperation had already been rendered and could not be withdrawn. The court also held that the promise was still binding and enforceable at the re-sentencing despite the state's argument that the promise, if it existed, was only binding with respect to the initial sentencing. Before crafting a remedy for the enforcement of the sentencing agreement, the district court considered [Respondent]'s claim that the prosecution's request for the death penalty at the resentencing was vindictive and therefore violated his rights to due process. The district court concluded that Lankford had made a sufficient showing to raise a presumption of vindictiveness which the prosecution had failed to rebut.

State v. Lankford, 903 P. 2d 1305, 1309-10 Following a sentencing hearing at which the State was permitted to present evidence in aggravation and at which significant mitigation was heard, the Court filed its Findings in Consideration of the Death Penalty Under Section 19-2515, Idaho Code, "and found that none of the aggravating circumstances outweighed the mitigating evidence such that a death sentence should be imposed." R RS vol. II, p. 509-520; *State v. Lankford,* 903 P.2d, at 1310, Petition App. 8 The Court then filed a Sentencing Opinion (R RS vol. II, p. 521) and sentenced Respondent to two consecutive fixed life terms. R RS vol. II, pp. 521-526, 530; *State v. Lankford,* 903 P.2d, at 1310; Petition App. 9.

On appeal, the Idaho Supreme Court affirmed the trial court's determination that an enforceable agreement existed. *State v. Lankford,* 903 P.2d, at 1311,1312; Petition App. 10-

11,13-14. The Idaho Supreme Court then found that the trial court's remedy striking the State's Notice of its Intent to Seek the Death Penalty but permitting the State to produce evidence and argument in support of an aggravated sentence failed to specifically enforce the State's agreement to recommend an indeterminate sentence. *State v. Lankford*, 903 P.2d, at 1313-14. The Court reversed the sentence and remanded for resentencing precluding the State from offering any evidence or argument at the proceeding before a new judge untainted by the State's prior breach. *State v. Lankford*, 903 P.2d, at 1314-15; Petition App. 20-21.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

The Idaho Supreme Court Decision Is Not Inconsistent With *Lankford v. Idaho*.

The Petitioner's contention that the Idaho Supreme Court's application of *Santobello v. New York*, 404 U.S. 257 (1971), by through specific enforcement of a binding agreement is inconsistent with this Court's earlier decision in this case is without merit. *See Lankford v. Idaho*, 500 U.S. 110 (1991). In *Lankford v. Idaho, supra*, this Court addressed a very "narrow issue" founded upon "unique circumstances" which raised the question of whether, at the time of the original sentencing, Respondent "and his counsel had adequate notice that the judge might sentence him to death." *Lankford v. Idaho*, 500 U. S., at 111. Throughout its Petition, the Petitioner factually and

legally confuses the due process concerns for the "adversary process" which necessitate adequate notice and the opportunity to be heard with the due process concerns of fundamental fairness in a government's dealings with a criminal defendant and defendant's right to rely on the agreements of the prosecution. *See e.g.*, Petition, pp. 15, 19, 21.

Contrary to the assertion by the Petitioner, this Court did not instruct the state court "to insure that the sentencing proceeding was fully adversarial." Petition, p. 15. In its rationale, this Court expressed constitutional concern that "[Respondent's] lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned. . ." *Id.*, at 127. The Court's concern for the reliability of the death sentence imposed rested specifically on due process demands of notice and with it, the opportunity to be heard. See *Lankford v. Idaho*, 500 U.S., at 126-127; *see also, Gardner v. Florida*, 430 U.S. 349, 360 (1977); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951). There is absolutely no inconsistency in the *Lankford* holding and this Court's holding that a party, either defendant or state, upon fair notice and opportunity to be heard, may voluntarily relinquish or "bargain away" the right to be heard. *See Lankford v. Idaho, supra; Santobello v. New York, supra*. This Court's enforcement of plea bargains and negotiations is wholly consistent with the due process notions of fairness, notice and

the opportunity to be heard.

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1974), this Court set out its approval of the enforcement of voluntary, fully informed agreements between government and criminal defendants.

> We have recently had occasion to observe: "[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. [434 U.S. 362] Properly administered, they can benefit all concerned." *Blackledge v. Allison*, 431 U.S. 63, 71, 97 S.Ct. 1621, 1627, 52 L.Ed.2d 136. The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, *Brady v. United States*, 397 U.S. 742, 758, 90 S.Ct. 1463, 1474, 25 L.Ed.2d 747, the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274, and the requirement that a prosecutor's plea-bargaining promise must be kept, *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427.

Id, at 361-62. The issue in *Lankford v. Idaho* was whether given the court action in ordering a notice by the State and its subsequent silence regarding its intent at sentencing undermined the defendant's right to notice and to be heard in order to insure the proper functioning of the adversarial system "-- a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." *Parker v. North Carolina*, 397 U.S. 790 (opinion of Brennan, J.). There is no relationship between this Court's prior decision in *Lankford v. Idaho*, and the issue resolved favorably to Respondent by the Idaho Supreme Court now before this Court. The Petitioner's exhortation that this Court ignore the findings of

fact of the courts of Idaho to permit the prosecution to renege on its promises at a time when the Respondent's reliance is irrevocable must be rejected and the petition denied.

II.

The Idaho Supreme Court's Decision Correctly Applies the Mandate of *Santobello v. New York*.

The Idaho Supreme Court's application of *Santobello v. New York* in this case was warranted by the facts and law. In the case at bar, Respondent, in reliance on the inducements of the prosecutor, relinquished his fundamental constitutional right not to testify and cooperated in the prosecution, conviction and death sentence of his brother and co-defendant, Mark Henry Lankford. The State, having received the benefit of the bargain, cannot now renege on its obligation to recommend an indeterminate life sentence. The Respondent's constitutional right to treated with fairness throughout the negotiations process compelled the Idaho Supreme Court's specific performance of the promise in conformance with *Santobello*. 903 P.2d, at 1311; *Santobello v. New York, supra*.

The Idaho Supreme Court correctly remanded this matter for resentencing because the State breached its binding agreement to recommend an indeterminate life sentence. The State's action in seeking the death penalty and then offering argument and evidence in aggravation unconstitutionally breached the parties agreement and the remedy of specific performance dictated by the Idaho Supreme Court decision is constitutionally permitted and

required.

In *Santobello v. New York*, 404 U.S., at 261-262, this Court sanctioned plea bargaining and held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Id.*, at 262. The Court reversed and remanded the case to *the state court for a determination of the appropriate remedy for a breach by the State*, noting that "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiations" compelled the reversal. *Santobello, supra*, at 262.

Idaho is in full accord with *Santobello*. *State v. Rutherford*, 107 Idaho 910, 915, 693 P.2d 1112 (Ct. App. 1985). A "defendant is constitutionally entitled to relief when the State breaches a promise made to him in return for a plea of guilty." *Id.*, at 913, *citing*, *United States v. Ocanas*, 628 F. 2d 353, 358 (5th Cir. 1980), *cert. denied*, 451 U.S. 984, 101 S.Ct. 2316, 68 L.Ed.2d 840 (1981). Specific performance is consistent with this Court's holding in Santobello. The Idaho Supreme Court did nothing more than apply the remedy approved in Santobello to the Respondent's favor. *State v. Lankford*, 903 P.2d, at 1313-1314.

Since *Santobello*, the courts have repeatedly held the prosecution to its duty to meticulously honor promises made in the course of negotiations. *United States v. Partida-Parra*, 859

F.2d 629 (9th Cir. 1988). Fundamental fairness requires that promises made during plea bargaining and analogous contexts be respected. *See Johnson v. Lumpkin*, 769 F.2d 630, 633 (9th Cir. 1985), *citing, Santobello v. New York, supra; United States v. Hudson*, 609 F. 2d 1326, 1328 (9th Cir. 1979); *United States v. Goodrich*, 493 F. 2d 390, 393 (9th Cir. 1974).

Although those cases involve guilty pleas, the logic that relinquishment of a constitutional right in reliance on a promise or inducement by the State creates an enforceable agreement is equally applicable to this case. *See People v. Fanger*, 748 P.2d 1332 (Colo. Ct. App. 1987), *cert. denied* (1988). In *Fanger*, the defendant's waiver of his privilege against self-incrimination and submission to the district attorney's interview in reliance upon the State's promise of a lesser charge and recommendation of probation was held to invoke due process guarantees in the enforcement of the bargain. *Id.*, at 1333-1334. Similarly, Bryan Lankford, in reliance on the promise of a life-sentence recommendation, waived his privilege against self-incrimination. The mere change in prosecutors cannot change the manner in which promises made are kept. The State's Notice that it intended to recommend, produce evidence and argue for the imposition of death was a serious breach of its duties, manifestly unjust and violated the Defendant's constitutional rights to due process under state and federal law.

After trial and before the original unconstitutional sentencing, the State of Idaho, through the prosecuting attorney

sought by certain inducements, to have the Defendant testify against Mark Lankford. As a result, Bryan Lankford provided critical testimony against his brother and was a material and significant witness in the State's successful prosecution against Mark Lankford. Consistent with the prosecution's request and efforts, Mark Lankford is now on death row.

In this case, the trial court found:

> The defendant has met his burden of producing evidence sufficient to support the existence of an agreement between the parties that the prosecution would recommend a life sentence in exchange for the defendant's cooperation throughout his brother's prosecution. This agreement is specifically enforceable by this Court and is binding on the parties at resentencing.

Appendix A, p. 32. R RS Vol. II, p. 390.

The Defendant, in reliance on the inducements of the prosecutor, relinquished his fundamental, constitutional right not to testify. The State, having received the benefit of the bargain, cannot renege on its obligation to recommend a life sentence. The Idaho Supreme Court's decision correctly preserved to Respondent his constitutional right to be treated with fairness throughout the negotiations process. *See People v. Fanger*, 748 P.2d at 1333.

B. The Remedy for the Breach of the Agreement at the Resentencing of a New Sentencing Before a New Sentencing Judge and Full Compliance with the Agreement as Ordered by the Idaho Supreme Court is Correct.

The Idaho Supreme Court found that the remedy ordered by the trial court was constitutionally deficient because it permitted the State to act contrary to the agreement found to have existed.

State v. Lankford, 903 P.2d, at 1314.

In *United States v. O'Brien*, the Seventh Circuit Court of Appeals stated,

> If the government has breached an agreement to make specific recommendations or to consider specific mitigating circumstances [regarding sentence to be imposed upon defendant in exchange for the defendant's cooperation in investigation], federal courts have both the power and the duty to order appropriate relief. [Citation omitted]. Depending on the circumstances of the individual case, such relief may include allowing the defendant to withdraw his guilty plea, [citation omitted]; specific performance of the plea agreement, [citation omitted]; or, ordering imposition of the specific sentence if neither of the above options would provide an appropriate remedy. *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973).

United States v. O'Brien, 853 F.2d, at 525-526. (Emphasis added). Respondent was entitled to the specific enforcement of the agreement, namely an affirmative recommendation by the State to a sentencing judge who was untainted by the State's breach. Anything less would have been constitutionally insufficient to remedy the harm created by the State's breach of agreement. The original trial judge's acquiescence in the State's promises and defendant's reliance thereon compels this court's full enforcement of those promises. *See People v. Jennings*, 443 N.W.2d 793, 794 (Mich.App. 1989). The Idaho Supreme Court's decision vacating the sentences imposed and remanding for resentencing before a judge who has not heard the evidence or arguments in aggravation with orders that the district court employ a procedure that does not involve the prosecution in the presentation of evidence in aggravation was wholly appropriate and consistent with the due process requirements set forth in

Santobello v. New York. State v. Lankford, 903 P.2d 1314-14.

III.

The Idaho Supreme Court's Decision Correctly Applies Fact and Law

A. Correction of Petitioner's Presentation of Procedural and Factual Background.

The Petitioner's Statement of facts is argumentative in nature, factually inaccurate and beyond the scope of the requirements of the Rules of the Supreme Court. See Rule 14(g). The States's inability to separate fact from argument does not serve this Court or the State of Idaho.

Petitioner confuses the sentencing agreement at issue here is not within the "scope of the immunity agreement." [2] Petition, p. 3. *See State v. Lankford,* 903 P.2d, 1310 n.2, 1315.

The State omits references to record references which support the critical findings by the trial court of that there was an enforceable agreement. See Petition, p. 7. After carefully reviewing the record, the Idaho Supreme Court concluded a binding agreement by the State to recommend the minimum available sentence existed for resentencing, concluding:

> The state points to no basis in the record for reversing the district court's conclusion about the existence of the agreement. The state proceeded with the testimony of Bryan Lankford during Mark Lankford's trial knowing that Bryan Lankford believed it was pursuant to an agreement for a recommendation of an

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[2] The immunity agreement is a written transactional immunity agreement entered into after conviction and prior to sentencing. The constitutional issues arising from the transactional immunity granted as preclusion from any sentence for the acts to which Bryan Lankford testified are separate and apart from the issues raised here of the State's breach of its agreement to recommend an indeterminate life sentence.

> indeterminate life sentence. Moreover, the state apparently made no effort to challenge the finding of the trial court in Mark Lankford's post-conviction proceeding that such an agreement existed. Also unrebutted by the state is the 1993 affidavit filed in this case by Bryan Lankford's trial counsel.

State v. Lankford, 903 P.2d, at 1311, Petition App. 10-11.

While the State quotes portions of the transcript of Mark Lankford's trial at length, it omits reference to those portions supporting the findings of the district court and the Idaho Supreme Court.

Petitioner wrongfully claims asserts that "[t]he Idaho Supreme Court's observation that Lankford testified in reliance on a promise for a sentencing recommendation is incorrect in light of the fact that the lack of such a recommendation was made clear prior to the time he testified." Petition, p. 7 n.1. The record is undisputed that at the time he testified, Bryan Lankford believed he had an agreement that the State would recommend an indeterminate sentence. [3]

Petitioner also omits from the recitation of facts the finding by the trial judge in the post-conviction proceedings of Mark Lankford in which Judge Reinhardt specifically finds:

> With reference to item "VII-A-2" of the Petition for Post Conviction Relief certain inducements were made to Bryan Stuart Lankford through the prosecutor's office for testimony including immunity, a life-sentence recommendation at sentencing, and the possibility of serving his sentence at a location apart from the

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[3] The trial judge, Judge George Reinhardt repeatedly notes Respondent *believes* there is an agreement, an understanding which is never remedied on the record prior to completion of Respondent's testimony. Tr EXH. Appendix D, Tr State v. Mark Henry Lankford, 20158 pp. 1275-76, 1278, 1281.

Petitioner.

R RS EXH., Appendix F: Excerpt from Findings of Fact, Conclusions of Law and Order in *Mark Henry Lankford v. State of Idaho*, Idaho County No. 21333 (July 1, 1985).

The Supreme Court correctly states, "[i]n summary, two different district courts have concluded that an agreement existed whereby Lankford was entitled to a recommendation for an indeterminate life sentence. The state has submitted no basis upon which to conclude otherwise." *State v. Lankford*, 903 P.2d., at 1311, Petition, App. 11

Representation by the State that at the original sentencing, "the prosecuting attorney recommended a sentence less than death" [Petition, p. 10] is more correctly stated as the State recommended indeterminate life sentences, "the most lenient sentence possible." *See, State v. Lankford*, 903 P. 2d at, 1314, Petition, at App. 18. Given the state of the record and the state courts' findings, Petitioner's assertion that "[t]he recommendation, as noted, was not the product of any agreement between the state and Bryan Lankford" is disingenuous indeed. Petition, p. 10. *See contra, State v. Lankford*, 903 P.2d. at 1311, App. 9-11; *see also*, Decision and Order of the trial court, pp. 9-10, Appendix A, R RS 367-368.

The State's assertion that "[t]his Court's prior opinion vacated the prior death sentence because "there was a risk that . . . counsel . . . had not adequately prepared for sentencing *as a consequence of the prosecuting attorney's recommendation for a*

sentence other than death" [Petition, p. 10 (emphasis added)] is an inaccurate representation of this Court's opinion. In Lankford v. Idaho, this Court found that the ***trial court's actions*** of "effectively concealing from the parties the principal issue to be decided at the [sentencing] hearing" deprived Bryan Lankford of adequate notice that the death penalty was at issue in violation of the Eighth and Fourteenth Amendment. *Lankford v. Idaho,* 500 U.S. 110.

The State's assertion that "the judge did not find Lankford's case for mitigation credible" [Petition, p. 11] is also inaccurate. Based on the evidence presented in mitigation, the judge found the following mitigating circumstances:

> 1) The defendant was of a relatively young age at the time of the murders (23 years old). Over time there may be some mellowing and maturing.
>
> 2) This court cannot find beyond a reasonable doubt that this defendant administered the blows that killed the victims nor that he intended to kill the victims.
>
> 3)The defendant confessed a short time after the murders and testified for the State against his brother, Mark, which contributed to the conviction and death sentence of Mark.
>
> 4)The State [at the original sentencing] recommended indeterminate life sentences for the defendant. . . .
>
> 5)Bryan Lankford was dominated by his brother Mark. . . .
>
> 6) The defendant has a low I.Q. and poor mental flexibility.
>
> 7) The defendant's history of emotional, physical and sexual abuse is a mitigating factor. Doctor Craig Beavers [sic] testified, after talking with the defendant and family members, that it was one of the worst descriptions of abuse that he had heard. The evidence regarding this abuse was uncontradicted. While it doe not excuse criminal conduct, it should be considered by this court as a mitigation factor.

8) The defendant does not have an extensive prior criminal record.

9) After return to Texas, the defendant did support Roy Ralmuto at a time when MR. Ralmuto appeared to be in danger from Mark Lankford.

10) During the sentencing hearing exhibits were presented which indicate that the defendant does possess artistic abilities and is capable of sensitive expressions through this ability.

11) While incarcerated, the defendant has read and watched educational television to try to understand himself and his problems.

12) While in prison, there is no evidence of physical violence against any person and no indication of any drug use.

13) Both psychologists and the psychiatrist that the defendant has some potential for rehabilitation.

14) All of the family witnesses who testified at trial expressed strong feelings for the defendant and their belief that he was not capable of killing two people while expressing their opinion that his brother Mark was cruel and was capable of killing.

15)Rod Eisele, a resident of Eagle, Idaho, who was the defendant's spiritual advisor during a period of time while the defendant was in prison, testified that he found the defendant to be easy-going, level-headed, with a good knowledge of the Bible.

R RS vol. II, pp. 510-12. The district court found that "all of the mitigating circumstances taken together outweigh the gravity of any aggravating circumstance found." R RS vol II, p. 518.

The State's assertion without citation to the record that the court "also found the crime was coldly premeditated by Lankford and his brother, (Petition p. 12)" is yet another misrepresentation of the trial court's findings. The court did not find intent to kill, less yet premeditation to commit murder. The "crime" which was premeditated (and at all

times admitted to by Bryan Lankford) was the intent to steal the van. Tr Vol. 12, p. 2327. By its omissions and misstatements the State wrongfully misleads this Court.

B. The Idaho Supreme Court's Findings and Applications were Consistent with the Record and the Law.

1. The State Agreed to recommend an indeterminate life sentence in exchange for Bryan Lankford's cooperation in the trial and sentence of Mark Lankford.

As noted above the Petitioner's Statement of the Case omits critical facts supporting both the district and supreme courts' findings that the State entered an agreement and was precluded from seeking or advocating a sentence inconsistent with its agreement to recommend an indeterminate life sentence. 903 P. 2d, at 1311. The Idaho Supreme Court carefully reviewed and affirmed the district court's factual finding that the State had entered into a binding agreement with Bryan Lankford upon which it could not constitutionally renege. *Id.*

The Idaho Supreme Court then determined whether that agreement extended to resentencing and following careful reading of *Santobello v. New York* and its progeny, the Idaho Supreme Court concluded the agreement entered into between the State and Bryan Lankford was enforceable at resentencing. The Court noted:

> To accept the state's position in this case would necessitate acceptance of the assumption that Lankford and the state entered into an agreement that contemplated the unusual procedural developments in the case. The state would need to show that Lankford agreed to give testimony against his brother in exchange for a one time recommendation by the state for an indeterminate life sentence, but the recommendation would no longer be forthcoming should he successfully

> appeal and obtain resentencing. In the absence of any evidence in the record suggesting that Lankford entered into such a short-sighted deal the district court correctly resolved the ambiguity in favor of Lankford.

State v. Lankford, 903 P.2d, at 1312.

2. The State Breached its Agreement at the resentencing.

The Idaho Supreme Court then decided whether the trial court had fashioned an adequate remedy given the State's breach of the agreement. The Court found the remedy fashioned by the trial court was constitutionally deficient. State v. Lankford, 903 P.2d, at 1314.

The Idaho Supreme Court found:

> [I]n allowing the state to put on evidence in aggravation, the district court effectively allowed the prosecution to advocate a position inconsistent with its promise to recommend an indeterminate life sentence, the most lenient sentence possible for a conviction of First Degree Murder. *Cf. State v. Little*, 138 N.H. 657, 645 A.2d 665, 669-70 (1994) (prosecutor did not breach plea agreement for sentence recommendation by making agreed recommendation and also presenting evidence in aggravation because the judge possibly could have imposed a more lenient sentence than that suggested by the prosecution).
>
> In addition to aggressively cross-examining the defense witnesses testifying in mitigation, the state presented the following evidence in aggravation: (1) testimony that Lankford had been a disruptive inmate while incarcerated on death row; (2) testimony by an expert witness that, based on psychological examinations of Lankford, he was a poor candidate for rehabilitation; and (3) testimony that one of the victims, Captain Bravence, was a combat-trained marine who could not have been subdued by Mark Lankford without Bryan Lankford's assistance due to Captain Bravence's knowledge of self-defense which would be contrary to Bryan Lankford's version of events.
>
> In addition to the evidence itself the state made the following arguments based on the evidence: (1) that Lankford willingly participated in the murders and was not dominated by his older brother; (2) that

> Lankford was highly culpable because he had "forged the Bravences' names to travelers' checks and credit card slips;" (3) that Lankford was highly culpable because he made the arrangements for the two brothers to stay with a friend in Los Angeles after the murders; (4) that Lankford was "manipulative," "dishonest," and "dangerous;" (5) that the witnesses who testified on Lankford's behalf in mitigation were not credible; and (6) that the defense's expert witness' testimony about Lankford's psychological condition was unreliable. **The state specifically argued in rebuttal against giving Lankford "the most lenient treatment," despite the fact that the court had earlier ruled the state was obligated to recommend an indeterminate life sentence, the most lenient sentence available for the crimes for which Lankford had been convicted.**
>
> At the outset of the resentencing proceeding, the district court instructed the prosecution that it had to walk a "fine line" in presenting evidence in aggravation while at the same time still bound to the original recommendation for an indeterminate life sentence. A review of the evidence and arguments indicates that the fine line was crossed many times. Allowing the state to make the arguments and introduce the evidence in aggravation to the extent that was done was reversible error, because it was so fundamentally at odds with the position the state was obligated to recommend that it amounted to a violation of the agreement. In this case the state was bound to a plea agreement for the minimum sentence that could be imposed. The evidence and arguments submitted by the state clearly called for a greater sentence.

State v. Lankford, 903 P.2d, at 1313-14. (Emphasis added.)

Where the state court has pronounced the correct rule of law, as in this case, the petition should be denied, regardless of the Petitioner's dispute with the facts found by the state courts. Rule 10 of the Rules of the Supreme Court of the United States.

IV.

The Idaho Supreme Court's Decision Does not Rest on the Issue of Prosecutorial Vindictiveness.

Certiorari should be denied on the second question presented because that question was not determinative in the Idaho Supreme Court's Decision. The trial court found that the prosecution was acting vindictively in its push for death. Appendix A, p. 32. The Idaho Supreme Court twice mentions approvingly the trial court's finding. *State v. Lankford*, 903 P.2d, at 1313 n. 4, 1314. The issue of prosecutorial vindictiveness was not, however, pivotal to the state court's decision, making consideration of the issue by this Court unimportant and unnecessary.

The Petitioner's claim that the unconstitutional sentence of death by the original sentencing judge is "a change of circumstances" supporting recommendation of a harsher sentence should be as summarily dismissed by this Court as it was by the trial judge. Appendix A, p.32. In its Decision and Order the trial judge notes the "changes of circumstances" advanced by the State below:

> The state argues that it is not inconsistent for it to take a new position in favor of the death penalty "where Lankford has been able to reopen the sentencing process." [Citation omitted.] During the motion hearing, the state advanced other reasons in support of its decision to recommend and seek the death penalty at re-sentencing. Those reasons were, essentially, that the first prosecutor apparently had undisclosed strategic reasons for recommending what he did; that the state has re-evaluated the evidence in light of the

> original trial judge's decision to sentence the defendant to death; that there is a different prosecutor representing the state at re-sentencing who could have no vindictive motive because it was not "his case" which was reversed; and that, since the defendant is permitted to reopen the evidentiary aspect of the adversary process, the state should also be able to do so by making a new recommendation and presenting evidence and argument thereon.

Appendix A, Decision and Order, p. 26-27; R RS Vol 1, pp. 384-385. The Petitioner's "change of circumstances" were soundly rejected by the trial court.

> The only thing that has changed between this sentencing and the last is that the defendant successfully appealed his sentence to the United States Supreme Court and had it overturned. There are no objective reasons on the record which overcome the presumption of vindictiveness."

Appendix A; p.29; R RS vol I, p. 387. This Court should reject the Petitioner's unfounded "change of circumstance" claim as readily as the courts below.

A claim for vindictive prosecution arises when the government increases the severity of the allegations in response to the exercise of constitutional or statutory rights. *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pierce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *United States v. Burt*, 619 F.2d 831 (9th Cir. 1980); *United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1980), *cert. denied*, 449 U.S. 863, 101 S.Ct. 167, 66 L.Ed.2d 80 (1980); *United States v. Marco*, 550 F.2d 1224 (9th Cir. 1977), *cert. denied*, 434 U.S. 827, 98 S.Ct. 105, 54 L.Ed.2d 85 (1977). "Due Process requires, then, that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in

the sentence he receives after a new trial." *North Carolina v. Pierce*, 395 U.S., at 725. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [citation omitted], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33 n.20, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973), *quoted in, Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

In *State ex rel. Patterson v. Randall*, 637 S.W.2d 16 (Mo.banc 1982), the Missouri Supreme Court granted a writ of prohibition prohibiting the trial court from permitting the State of Missouri to seek the death penalty upon his retrial for capital murder on the grounds that such a second trial violated the due process clause, the ban against cruel and unusual punishment and the State's election not to seek the death penalty in the first trial constituted a waiver of the death penalty on retrial. The new trial was granted for failure to disclose discoverable information. The only change between the first and second trial was the current prosecutor believed in the death penalty and the prosecutor at the original trial did not. *Id*, at 17. In granting the writ, the court found,

> Because due process of law prohibits the State from responding to a person's invocation of his right of appeal by bringing a more serious charge against a defendant prior to his new trial, the same is necessarily true of subjecting the defendant to a more serious penalty subsequent to his successful appeal.

Patterson, supra at 18.

> A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration. *Blackledge*, 417 U.S. at 28. It is the increased penalty associated with the charge that makes it "more serious."

Id. Where there is a variance in the prosecution's decision concerning the severity of the penalty sought, notwithstanding that the jury and not the prosecution assesses the death penalty, there is a realistic likelihood of vindictiveness. *Patterson, supra. See also, People v. Walker*, 419 N.E.2d 1167, 1175 (Ill. 1981).

Where there is a prima facia showing of prosecutorial vindictiveness, the burden shifts to the State to demonstrate no vindictive motive exists. *State v. ex re. Patterson v. Randall, supra*, at 18. "In order to meet this burden the State must show objective, on the record explanations which rebut the realistic likelihood of vindictiveness. The burden increase greatly when the likelihood of vindictiveness arises after a conviction." *Id.*, at 18-19. In *United State v. Goodwin*, the Supreme Court noted:

> . . . once a trial begins-and certainly by the time a conviction has been obtained- it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is complete is much more likely to be improperly motivated than is a pre-trial decision.

457 U.S. 368, 382, 102 S.Ct. 2485, 2493, 73 L.Ed.2d 74 (1982).

In *Patterson*, the Court found that the prosecutor's election to seek the death penalty at Patterson's second trial constitutes a due process violation and the proposed action of the trial court to allow such a violation of due process was not within its jurisdiction and must be prohibited. 637 S.W.2d, at 19.

The trial court here found that the State's change in position was vindictive and ordered the State not to recommend a sentence inconsistent with the original recommendation. R RS vol. II, p. 390; Appendix A, p. 32. While the court's findings are correct and his efforts to find a reasonable balance commendable, the remedy ordered was not constitutionally sufficient. *State v. Lankford*, 903 P.2d, at 1313-14. The Idaho Supreme Court's remand with instructions insures that at resentencing preservation of the constitutional prohibition of prosecutorial vindictiveness. *State v. Lankford*, 903 P.2d, at 1314. Given the accurate fact-finding and correct application of the prevailing constitutional principles, certiorari should be denied.

V.

The Decisions of the Idaho Supreme Court Is not Inconsistent with the Holdings of Other State Courts of Last resort.

Lastly, the Petitioner's contention that the Idaho Supreme Court's decision is inconsistent with holdings of other state courts of last resort is without merit. Petition, pp.24-16. To support the contention, Petitioner first relies on *State v. Loehmann*, 467 A.2d 118 (Vt. 1983). *State v. Loehmann* is inapplicable to the Idaho Supreme Court's decision because the

court in *Loehmann* found that **there was no agreement** by the State. In this case, two district courts and the Idaho Supreme Court have found an agreement existed. *State v. Lankford*, 903 P.2d, at 1311.

Petitioner's reliance on *People v. Smith*, 827 P.2d 577 (Colo. 1991) is also misplaced. *Smith* holds that the prosecutor agreements cannot bind a trial court's sentencing determination. The decision by the Idaho Supreme is wholly consistent with the principle. In *State v. Lankford*, 903 P.2d, at 1313, the Idaho Supreme Court specifically provides a mechanism for the independent exercise of the trial court's sentencing decision without participation by the State. *Id.*, at 1314.

Simply put, Petitioner's representations to this Court that the Idaho Supreme Court's Decision is inconsistent with the decisions of other courts of last resort and with this Court's prior decision are unsupported in fact and law. Petitioner seeks redress from this Court only because the vindictive prosecution by the Petitioner has been thwarted by the appropriate enforcement of the Constitution of the United States by the Idaho courts.

CONCLUSION

No compelling reason exists for this Court to grant Petitioner's Petition for Writ of Certiorari. It should be denied.

DATED this 29th day of February, 1996.

Respectfully Submitted

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